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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re FRANCISCO M., A Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

H027572

Plaintiff and Respondent,

(Monterey County
Superior Court
No. J37961)

v.

FRANCISCO M.,

Defendant and Appellant.

_____/

The Monterey County District Attorney filed a petition under Welfare and Institutions Code section 602 and alleged that 17-year-old Francisco M. committed assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1) - count 1)¹, made criminal threats (§ 422 - count 2), and falsely identified himself to a police officer (§ 148.9, subd. (a) - count 3). The petition also alleged that Francisco had a prior sustained finding of first degree burglary (§ 459). Francisco admitted count 3, and after a hearing, the juvenile court sustained count 2 and found that Francisco committed brandishing (§ 417) as

¹ All further statutory references are to Penal Code.

a lesser related offense of count 1. The juvenile court continued Francisco as a ward of the court and placed him on probation. For the reasons stated below, we modify the order by vacating the brandishing finding. As modified, the order is affirmed.

I. Statement of Facts

1. Prosecution Case

At about 3:30 p.m. on September 16, 2003, Juan Molina Ramirez was working on his car in his front yard. Jesus Lopez, his friend, was helping him. Francisco, who lived in a nearby trailer, confronted Ramirez. Ramirez had had a romantic relationship with Francisco's mother. Francisco was angry with Ramirez, because he had physically abused his mother.

As Francisco approached Ramirez, he held a kitchen knife in each hand and threatened to kill Ramirez. Francisco swung the knives towards Ramirez and rotated his wrists. Francisco, who was about four to eight feet away from Ramirez, "moved [the knives], like, as if ... he wanted to hurt" Ramirez. Francisco also kicked at Ramirez, who jumped back.

Ramirez was scared and nervous. He told Francisco that he was going to call the police and ran to his residence. While he was at his residence, Ramirez watched Francisco walk towards his trailer and then walk back towards Ramirez's trailer. Ramirez entered his trailer for three to four minutes, but did not call the police.

Ramirez exited his residence and told Francisco to drop the knives so they could fight with bare fists. Francisco put the knives in his pocket. Ramirez told Francisco, "Fight me like a man." Francisco approached Ramirez and hit him with his fists. When asked whether he was afraid that Francisco had knives in his pockets, Ramirez said, "Well, it was just a risk that I took, but I didn't really care." He also stated that he was not afraid that Francisco had knives in his pockets.

Ramirez became embarrassed when Francisco's mother arrived, so he did not hit him. Francisco knocked Ramirez to the ground. After Francisco left the scene with his mother, Ramirez called the police.

Lopez testified that he remained outside during the incident. Francisco, who was about six feet away, had a knife in each hand and threatened to kill Ramirez. Ramirez ran to his residence, but did not say that he was going to call the police. Francisco continued to yell threats at Ramirez while he was in his residence. Francisco then walked about 20 feet away and discarded the knives. Francisco and Ramirez then began fighting with their fists. Francisco knocked Ramirez to the ground where he hit and kicked him.

2. Defense Case

Martina Alamo testified that she and Ramirez had previously been involved in a romantic relationship. However, she ended the relationship because Ramirez was physically abusive.

Francisco testified that he was angry with Ramirez because he abused his mother. He approached Ramirez and asked him why he was trying to abuse and rape his mother. Francisco did not intend to harm Ramirez, but wanted to talk to him. Ramirez responded angrily and told him to fight him like a man. According to Francisco, he did not possess any knives during the confrontation. Ramirez never ran into his residence.

Brenda, Francisco's younger sister, testified that she saw Francisco and Ramirez hitting each other with their fists. She did not see a knife.

Officer Rodolfo Roman testified that he was dispatched to the scene of the assault. He later arrested Francisco at a different location. The police conducted a search of Francisco's person and location, but no knives were recovered.

II. Discussion

II. Sufficiency of the Evidence

1. Standard of Review

“An appellate court must review the whole record in the light most favorable to the judgment in order to determine whether it discloses substantial evidence that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt.” (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1136.) “‘The test is whether substantial evidence supports the [conclusion of the trier of fact], not whether the evidence proves guilt beyond a reasonable doubt.’ [Citations.]” (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) Substantial evidence in a criminal case is “evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

2. Section 422

To prove a violation of section 422, the prosecution must establish “(1) that [Francisco] ‘willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,’ (2) that [he] made the threat ‘with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,’ (3) that the threat—which may be ‘made verbally, in writing, or by means of an electronic communication device’—was ‘on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,’ (4) that the threat actually caused the person threatened ‘to be in sustained fear for his or her own safety or for his or her immediate family’s safety,’ and (5) that the threatened person’s fear was ‘reasonabl[e]’ under the circumstances. [Citations.]” (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Francisco argues that the evidence was insufficient to show that Ramirez experienced the “sustained fear” required by section 422.

“The phrase to ‘cause[] that person reasonably to be in sustained fear for his or her own safety’ has a subjective and an objective component. A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances.” (*In re Ricky T.*, *supra*, 87 Cal.App.4th 1132, 1140.)

“Defining the word ‘sustained’ by its opposites, we find that it means a period of time that extends beyond what is momentary, fleeting, or transitory.” (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 [requirement met where defendant was arrested 15 minutes after making armed threat to kill victim and her daughter].)

Here Francisco walked up to Ramirez, waved knives at him, and threatened to kill him. Ramirez testified that he was scared and nervous. He ran to his residence and stayed inside for three or four minutes. Francisco continued to yell threats. Ramirez was in sustained fear for more than a “momentary, fleeting, or transitory” period of time, and given Francisco’s conduct, this fear was reasonable. Thus, substantial evidence supports the juvenile court’s finding that Francisco committed a violation of section 422.

B. Finding of Brandishing

The minor next contends, and the People concede, that the juvenile court erred in finding that he committed brandishing.

The juvenile court cannot find that a minor committed an uncharged offense unless the crime is a lesser included offense or the minor agrees to the finding. (*In re Alberto S.* (1991) 226 Cal.App.3d 1459, 1464.) Brandishing is not a lesser included offense of assault by force likely to produce great bodily injury. (*People v. Escarcega* (1974) 43 Cal.App.3d 391, 397-398.) Since the minor did not consent to the finding of brandishing, it must be vacated.

III. Disposition

We modify the order by vacating the brandishing finding. As modified, the order is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

McAdams, J.